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No. [redacted] 103

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

ALBERT ROVIARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Albert Roviaro, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois entered February 17, 1969, granting the Respondent United States of America's motion to dismiss the Petitioner's motion to vacate sentence and judgment of conviction pursuant to 28 U.S.C. 2255.

OPINIONS BELOW

The opinion of the District Court Judge issued February 17, 1969, has not been reported, but is printed as Appendix "B" to this petition. The opinion of the Court of Appeals issued January 5, 1970, has not been reported, but is printed as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1970 (Appendix A). Petition for Rehearing was denied by order entered February 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May a District Court Judge and a panel of the Court of Appeals ignore an *en banc* decision of that Court of Appeals and deny a petition pursuant to 28 U.S.C. 2255, thereby upholding a conviction based upon evidence obtained by means of illegal electronic eavesdropping, *i.e.*, evidence obtained by use of an electronic radio transmitter carried on the person of a government informer acting under coercion, and evidence received in violation of 47 U.S.C. 605?

2. Were the rights of the petitioner, who was the only defendant found guilty in a conspiracy case, under the Sixth Amendment and under the holding in *Bruton* v. *United States*, 391 U.S. 123, 20 L.Ed. 2d 476, violated by admission of extra-judicial statements and acts of co-defendants when the co-defendants did not testify, and which statements and acts although prejudicial to the petitioner, were admitted under instructions to the jury to consider them only as to the alleged speaker or actor, particularly when one of the co-defendants was dismissed on motion

of the government, but the petitioner's motion to strike the testimony or for a mistrial was denied, and when the jury disagreed as to the guilt of one of the other co-defendants and a mistrial was declared, and found the remaining co-defendant not guilty?

CONSTITUTIONAL PROVISIONS INVOLVED

"AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATUTES INVOLVED

28 U.S.C.

"§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum autho-

rised by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

47 U.S.C.

"605 Unauthorized publication or use of communications.

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks to review the judgment of the Court of Appeals affirming the judgment of the District Court granting the government's motion to dismiss the petitioner's motion to vacate sentence and judgment of conviction pursuant to Section 2255 of Title 28, United States Code (R. 31, 32).* The trial judge filed a written opinion which appears at R. 31.

The petitioner's 2255 motion was directed towards the judgment and sentence of conviction entered in the United States District Court for the Northern District of Illinois in the case of *United States* v. *Walter Anderson, Albert Roviaro, et al.,* No. 65 CR 543 (A. 99, 105). That case was tried before a jury and resulted in the petitioner Roviaro being the only one amongst four defendants to be found guilty (A. 100). The facts will be set forth in chronological order beginning with the indictment in the criminal case.

The indictment charged that the petitioner along with Walter Anderson, John Capko, and Richard Sandsbury and eight named unindicted but alleged co-conspirators did conspire "to import fraudulently and knowingly and bring into the United States and territory under their control and jurisdiction, narcotic drugs contrary to law, and to receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of such narcotic drugs

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* "R" refers to the record on appeal in this case, no appendix having been prepared pursuant to Circuit Rule 9 of the Rules of the United States Court of Appeals for the Seventh Circuit. "A" will refer to the appendix filed in the petitioner's appeal of his criminal conviction, *United States* v. *Roviaro*, No. 15759, a copy of which is contained as a part of the record on appeal in this case and appears at R. 5.

after being unlawfully imported and brought into the United States contrary to law; in violation of Section 174, Title 21, United States Code". Counts two and three charged the petitioner Roviaro alone with the substantive offense of having used a telephone in the commission or attempting the commission of an offense on two different dates (A. 2-4).

The petitioner Roviaro filed a written pre-trial motion for severance which was denied (A. 7, 13). The motion for severance was renewed and denied several times (A. 21, and see docket of 65 CR 543 filed with record on appeal at pp. 4-5).

The evidence for the Government consisted of the testimony of five of the unindicted but alleged co-conspirators and the testimony of various government agents. Three of the unindicted but alleged co-conspirators who testified did not know the petitioner Roviaro, and their testimony was admitted solely against the defendants Sandsbury and Anderson. The defendant Sandsbury was dismissed on the government's motion prior to the conclusion of its case in chief (A. 66). The jury was unable to reach a verdict as to the defendant Anderson and a mistrial was declared as to him (A. 99). He was subsequently dismissed on the government's motion (See docket of 65 CR 543 filed with record on appeal p. 6). The trial court refused to strike the testimony (A. 99).

In particular, the witness RICHARD LEE COLLINS testified that he knew Sandsbury since 1954 and Anderson since 1958, both in Indianapolis. He did not know nor identify Roviaro or Capko. He stated he had been convicted of a narcotics violation in 1963 (A. 21).

Collins stated that in July, 1958, at Sandsbury's invitation, he went to work for Walter Anderson, remodeling his home. Sandsbury told him that Anderson had some good stuff (A. 21).

When he went to work the next day, Walter Anderson told him what should be done and he said he should see Sandsbury for whatever he needed. Sandsbury then came in and Walter Anderson left. Sandsbury asked him if he wanted some good stuff and gave him three capsules of white powder (A. 21).

Collins stated he then went to a drug store, bought a hypodermic needle and an eye dropper. He went into a restroom, got a pop can, emptied the capsules of white powder into the top, added some water, heated the mixture, and then injected himself with the fluid. He got a funny feeling in his throat, then got a "relaxed" . . . "light" . . . "high" feeling (A. 21-22).

Collins kept working for Anderson until November, 1960. In March, 1960, he began selling for Anderson and Sandsbury because Walter Anderson had threatened to cut him off if he didn't sell (A. 22). In April of 1960, Walter Anderson turned him over to his brother Robert. He was then selling 70 to 80 capsules per day.

On Cross Examination by Mr. Pincham who represented Sandsbury and Anderson, Collins stated he was in error when he said he saw Sandsbury up to November 1960, when reminded that Sandsbury went to jail in April, 1960.

He stated that he, Anderson, and Sandsbury were addicts.

He described his fear of not getting the drugs and the feeling with the result that he never wanted to be without it. He did not know where Anderson or Sandsbury got the drugs (A. 23).

ROBERT ANDERSON, JR., also an alleged but unindicted co-conspirator stated he was currently serving a federal sentence for sale of narcotics in August, 1962.

He testified to purchasing, with Walter Anderson, narcotics from Kenney McGuire and later Orville Drake up to September, 1961 (A. 24).

He described the high feeling he received from using the white powder. He identified Walter Anderson and Richard Sandsbury (A. 25).

He did not know nor did he identify Roviaro or Capko.

On Cross-Examination by Mr. Pincham, he described more of his purchases from McGuire. He stated he also bought from Jack Hilton (A. 26).

He admitted he thought it better to be a co-conspirator than a defendant. He further admitted he had used a statement given him by Agent Waltz to refresh his recollection for testifying (A. 26, 27).

FREDERICK L. DRAKE, who was also an unindicted but alleged co-conspirator testified that Orville Drake, a deceased alleged co-conspirator, was his father. He testified that after talking with Orville Drake in the latter's home in Indianapolis, Indiana, Fred Drake sold some capsules of white powder for Orville Drake in the spring of 1956 (A. 27).

Fred Drake first met Albert Roviaro in February, 1961, and present were Fred's wife, his father Orville, and stepmother Florence Drake, and Mr. and Mrs. Roviaro (A. 27).

Fred Drake met Roviaro several times in 1961, near Fowler, Indiana. On one occasion, in June 1961, Drake accompanied his father, Orville, to Fowler, Indiana, where his father dropped him off at a tavern. When Orville Drake returned in about twenty minutes, Fred noticed a small package which Orville placed between the seats. In September of 1961, Orville Drake died, after leaving a

shoe box with Fred for safekeeping. Fred found some 15 small packages of white powder in the box and called Jack Hilton, named as a co-conspirator, and Hilton turned over to Fred Drake about thirty packages of white powder.

About one week after September, 1961, Drake received a phone call that he subsequently came to know as that of "Chick" Roviaro. This voice asked if Drake was going to carry on his father's business, and that Fred Drake replied yes, but he did not know who the customers were. The voice said hold on, that he would send somebody, and that Orville Drake owed $5300 for the last buy.

After a phone call from Roviaro, Fred Drake met Roviaro at the 100 Mile Inn in Fowler, Indiana. They drove to the outskirts of Fowler, where they stopped at a dead end road, and Roviaro reportedly stated that this was where he had met Orville Drake, and that from now on Roviaro and Fred Drake would meet there. Drake said that Roviaro claimed that "Dad" had told him about the colored boys, and that Roviaro again told Fred Drake about the $5,300.00, then told him not to worry about it, that it could be paid as Fred Drake sold stuff. Roviaro also gave Fred Drake a phone number and asked Fred Drake to get him some numbers in booths where he could call Fred Drake. This was all in October, 1961. Fred Drake met Roviaro three more times between October and the end of the year, although Fred Drake could not remember the date. There were no business transactions of any kind of these claimed meetings.

Fred Drake then testified to being acquainted with Robert Anderson and said that in October, 1961, he sold Anderson three ounces of white powder that he had taken from the shoe box (A. 29). Thereafter, Fred Drake made various sales to Walter Anderson of white powder. After

this, on or about July 6, 1962, he sold some white powder to a man named "Duke", and thereafter made several other sales to Duke, who turned out to be Agent Robert Waltz of the Bureau of Narcotics. Thereafter, in the presence of and on instruction of agents and police officers, on various occasions, Fred Drake made phone calls attempting to reach Roviaro and did reach him and had various conversations purported to be concerning "stuff" and "pieces" (A. 30-31).

Fred Drake then testified to various meetings and conversations with Roviaro and Capko, all purporting to be concerned with possible narcotics sales, but none of which did result in any indication of importation, purchase, sale, distribution or facilitation thereof, of narcotics by Roviaro, or for that matter, Fred Drake. (A. 32).

Drake testified that prior to these meetings, Agents Cass and Waltz equipped him with a radio transmitter which they concealed on his person by taping to his thigh (A. 32, 33).

Drake testified that he had ridden out to O'Hare Airport with Roviaro. At that time, he had the transmitter on. He did not testify to any conversation during that trip (A. 32).

On Cross-Examination, he testified that he had never purchased narcotics from anyone (A. 35). He did testify that he sold narcotics to Jack Hilton and Walter Anderson and that he stopped selling to Anderson in 1962 because his brother had been arrested. He further stated that he increased his prices to Hilton knowing the ultimate purchaser to be an addict. He admitted he had been arrested in 1962, that he had been arraigned and was presently on bond. He did not have a lawyer and he did

not know the possible penalty he faced. He is not a defendant in this case. He hoped his testimony would be brought to the attention of the Court (A. 34).

He stated that he was being reimbursed by the government for his expenses (A. 25). The defense was not allowed to inquire into the actual expenses as compared to reimbursement (A. 35).

He understood the transmitter strapped by him to be a transmitter to a radio in a car. The agents never sat close enough to hear the conversations (A. 36).

THOMAS KARL HILTON (A. 36), testified that he is an Indiana State Highway Inspector, and stated that he was convicted of a felony for issuing fraudulent checks in 1945, and of burglary in Indiana in 1950. Hilton testified to his acquaintance with Orville Drake, Walter Anderson and Fred Drake, and to narcotic transactions in 1959 with Orville Drake and Anderson. And Orville Drake in 1959, after having Hilton help him with the mixing and packaging of one-ounce packages of white powder, left the scales and other equipment with Hilton, paying him for his help.

Hilton further testified that in November, 1959, he and Orville Drake drove to Fowler, Indiana, and that upon their return from this and other trips, Orville Drake had, in his possession, about four pounds of white powder, and on one occasion, they dropped a package of white powder off at Fred Drake's house (A. 38).

In October, 1961, Fred Drake came to Hilton's office and picked up the powder that Orville Drake had left with him, and after that, Hilton was set up as the contact between Fred Drake and Robert Anderson, and Hilton stated that from October, 1961 to June 1962, he then sold Robert Anderson an average of three ounces a week at $200.00 per ounce.

Hilton was arrested in June, 1962 by Agents Cass and Jefferies, and turned the scales and the cardboard box in which they were contained over to Agent Cass. He was not required to turn over any white powder to them and returned that to Fred Drake. Hilton said that he had never received white powder from anyone other than Orville Drake or his son, Fred Drake.

On Cross-Examination, Hilton said that he had agreed to cooperate with Agent Cass and was turned loose, and no charge was ever placed against him; that he received $50.00 and Fred Drake $150.00 out of each $200.00 an ounce.

He further stated that he and Fred Drake had once talked to Honschell, named as a co-conspirator, about the sale to them of some heroin, but that no sale ever occurred.

He neither in his direct testimony, nor on cross-examination, claimed to know or have any dealings with Roviaro or Capko.

All of the testimony of Collins, Anderson, and Hilton was admitted over the objection of the petitioner Roviaro and under "protective instructions" such as, " . . .You may take into consideration with respect to any one defendant only things which he said or did . . . " (R. 7-4b).

FLORENCE DRAKE (A. 41), identified and stated that she knew Albert Roviaro and married Orville Drake on January 1, 1956. In March, 1961, she and Orville Drake went to Fowler, Indiana, where they met Roviaro outside Fowler. Orville got in Roviaro's car, and after twenty minutes, Orville re-joined her, and she and Orville went to Indianapolis.

In April, 1961, she and Orville Drake met Roviaro and his wife at Kentland, and that Orville Drake and Roviaro were absent for about twenty minutes.

EDWARD R. CASS testified that he was a federal narcotics agent. He further testified to directing Fred Drake to make certain phone calls to Roviaro. The objections to this testimony as being electronic eavesdropping and in violation of Section 605 of the Communications Act were overruled (A. 42, 43).

He further testified that he and Agent Waltz equipped Fred Drake with a transmitter by which he overheard two conversations between Drake and Roviaro. The objections to the conversations as being overheard via electronic eavesdropping and in violation of the defendant's rights were overruled (A. 43).

On cross-examination, he stated that he gave Fred Drake $2,400.00 in advance funds on May 4, 1963 for Drake to make a buy. However, he subsequently received the $2,400.00 back. There was no purchase (A. 44-45).

IT WAS STIPULATED that on April 23, 1963, the complaint against Fred Drake was dismissed upon the Government's motion. This stipulation was the result of production by the defendants of certified copies of the order (A. 44).

RICHARD JONES (A. 45) stated that he was a Detective Lieutenant with the Indianapolis Police Department, and that he heard Fred Drake make a long distance call to Chicago, and that the party on the other end said, this is "Chick"; and that he had been unable to contact Drake because he had lost the number.

On Cross-Examination, he stated that his business that day was to help the Federal Bureau of Narcotics.

The objections to his disclosure of the phone conversations were overruled (A. 45).

ABBIE GREGORY (A. 45) testified that she was a special agent with the Illinois Bell Telephone Company, and she produced records, Government Exhibits 6, 6A and 6B and 7, 7A, all of which were admitted into evidence.

The objections to the disclosure of phone calls was overruled (A. 46).

On Cross-Examination, she claimed to have general supervision of the records but admitted she is not the only one with supervision, and that her job was to produce records in response to subpoenas, and she did not see the particular records or know of their existence before they were delivered to her.

The Motion to strike Exhibits 6 and 7 was denied (A. 46).

RAYMOND LEE VINSIK (A. 46), stated that he is a federal narcotics agent, and that on February 16, 1963, he saw Roviaro and Fred Drake at the bar in Cap's Table, and that he also saw Capko there, and saw Cap talk to Roviaro.

ALLEN R. PRINGLE (A. 47), testified that he is a federal narcotics agent, and that on February 15, 1963, he observed Roviaro in the coffee shop of the Florence Hotel in Chicago. He further stated that on February 16, while watching Roviaro and Fred Drake, he saw a woman whom he later learned to be Eva Neforos, walk up to Roviaro and then go into a back room. Roviaro followed her. About five minutes later, he came out, said something to Fred Drake, and then both Drake and Roviaro went into the back room.

ANTHONY S. POHL (A. 48) testified that he is a federal narcotics agent, and that while watching Cap's Table on May 4, 1963 at about 10:00 P.M., he had a beer, and that when he went to pay the bartender, he noticed Capko behind him, and as he walked out, Capko watched him.

On Cross-Examination, he stated that he is 6 feet, 3 inches, and weighs 200 pounds, but that he did not have a weapon with him on the date of this occurrence.

CHARLES E. VOLL (A. 48) tesitfied that he was a Federal narcotics agent, and that he saw Drake, Capko and Roviaro in Cap's Table, a restaurant, on May 4, 1963, and observed them in conversation with each other.

BERNARD THEISEN (A. 49) stated that he was a Federal narcotics agent and testified to following Fred Drake and Roviaro to O'Hare Airport on February 16, 1963. He stated he had been present earlier when the radio transmitter was attached to Drake.

The objections to the overheard conversations were overruled (A. 49).

Theisen stated that he heard Roviaro tell Fred Drake about his (Roviaro's) associations with Fred Drake's father in the old days via the transmitter while following them as they were driving to O'Hare (A. 49).

No one was at the airport and they returned to Cap's Table (A. 50).

By means of a radio transmitter, Theisen heard Roviaro introduce Drake to a woman named "Eva", who said that since she did not see Roviaro at the Airport, she had taken a cab home from there. Theisen said that later, he heard Roviaro say, "The Stuff I got was garbage, and I don't want to sell you anything that's not good."

The objections to the overheard conversations were overruled (A. 50).

ROBERT E. WALTZ (A. 51), testified to making purchases from Hilton and Fred Drake in 1962. He identified Government Exhibits 1-A, 1-B and 1-C as being the materials and containers involved in his first transaction with them on July 6, 1962. On July 7, he made another purchase, and he identified Government Exhibit 2 and its components as being the white powder and containers involved in that sale to him by Drake and Hilton.

His third purchase on July 19, 1962 was from Drake in a parking lot, and he identified Government Exhibit 3 and its components as being the powder and containers involved. He then testified that on May 4, 1963, he overheard through electronic devices, conversations between Drake, Capko and Roviaro at a restaurant in Chicago called "Cap's Table".

The conversations involved Drake wanting to purchase narcotics and Roviaro replying that he couldn't get hold of his man with the stuff.

The objections to the electronically overheard conversations were overruled (A. 54).

On Cross-Examination, Waltz said that he did not take part in the arrest of Jack Hilton, but that he knew that Hilton and Robert Anderson were arrested at about the same time. He found out that Hilton became a special employee on July 5, 1962, and he did not at that time know that Hilton had been convicted of burglary and forgery, but now knows it.

Hilton at about that time agreed to introduce Waltz to Fred Drake, and no charges were filed against Hilton.

Waltz said that after meeting Drake through Hilton, he made various purchases, previously described, and in making these purchases, paid Fred Drake $1,300.00 of Government money, and that the Government never received any of this money back, and that Fred Drake had kept it all. He further testified that Drake, although arrested on October 31, 1962, had all charges dismissed against him on the Government's motion on April 29, 1963.

On further Cross-Examination, an objection as to whether Drake was charged with all the offenses that he had committed was sustained.

At the conclusion of Waltz' testimony, Government group exhibits 1C, 2C and 3C were received into evidence over objection. They consisted of narcotics purchased by Waltz from Fred Drake and Hilton, and apparently emanated from the shoe box given to Fred by his father, Orville. Government Exhibit 5, the scales given to Hilton by Orville, were received in evidence over objection.

The objection that all of these sales were in Indiana, out of the district in which the prosecution was brought, was overruled, and objection as to relevancy was overruled (A. 58, 59).

JOHN D. ENDRIZ (A. 59), as a Chief Chemist for the U.S. Government in Chicago, testified that Government Exhibits 1C, 2C and 3C contained heroin diluted with manite.

The government moved to dismiss the defendant Sandsbury, which was granted. The petitioner Roviaro moved for a mistrial, a severance, and to strike testimony admitted as to Sandsbury which was denied.

The government then rested and the motions for acquittal were denied (A. 59).

EVA NEFOROS (A. 59), testified that she is a widow, and that prior to her husband's death, they had a restaurant which they leased from Roviaro, and that she has known him and his family for thirteen years.

She stated that she knew Agent Waltz and met him when he served her with a subpoena.

On February 1, 1963, she visited her sister in Canada because her sister is taking care of Mrs. Neforos' five-year old daughter. She had expected Roviaro to meet her upon her return from Canada, but no one met her. When she arrived at her home, her sister told her that Roviaro had gone to meet her and apparently missed her. She then went to Cap's Table, a restaurant, had two drinks with Roviaro and met a friend of Roviaro's when she was there (A. 60). This friend was named Fred, and there was no conversation about her passing through customs.

Mrs. Neforos said that all she brought with her from Canada was her clothing and some souveniers, and that she did not give Roviaro anything, nor was there any conversation about narcotics either with her or which she overheard. She said that she next talked about her trip to Canada about 18 months later with Agent Waltz and another agent when she was served with a subpoena, and she told them the same story. Mrs. Neforos said that she appeared before a grand jury, and objections as to whether that was the grand jury which returned the indictment was sustained. She said that when she went to the grand jury, she talked to two men, including a Mr. Bailey whom she did not see in the court room, and a question as to her conversation with Bailey was objected to and sustained.

Mrs. Neforos said that she had never made any statement contrary to what she told Agent Waltz, and that she knows nothing about narcotics. She also stated that she has been friendly with Roviaro and his family for 12 years and she is not a girl friend.

JOHN CAPKO (A. 61-64), testified that he operates Cap's Table which is a restaurant with three rooms, a front room, a small secondary room, and a rear room. The front room contains a bar, a steam table, and tables to eat at. The other rooms contain dining tables.

Capko testified that he has frequently taken telephone messages for many people, and that he has never discussed dealing in narcotics with Roviaro or anyone else, and is not guilty, and he has never seen the defendants Sandsbury or Anderson prior to the trial, and did not remember seeing Fred Drake.

JAMES J. DRISCOLL and RICHARD BUCK (A. 65), testified that Capko's reputation for truth and veracity, honesty and integrity, was good, and it was stipulated that if Capko called the Reverend Harry J. Stubbs and Mr. Robert Schmidt, that they would testify to the same effect.

All parties rested (A. 66).

Motion for acquittal and for severance were denied (A. 66, 90-91).

The Court then charged the jury in part as follows:

> "Now we know that in determining whether or not a defendant or anybody else, a co-conspirator not here a defendant, for example, was a member of a conspiracy, you cannot consider, and I have told you this a number of times, what others may have said or done. That is to say, the determination as to whether or not a particular individual defendant was a member of a conspiracy has to be determined solely on the

basis of what he said or did, his own conduct, and not on the basis of what anybody else may have said about him or done as evidence of his participation in the conspiracy. So when you examine the evidence with respect to each of these three defendants, you will have to look and see on the basis of what they said or did whether you conclude that there was a conspiracy of which they were a member.

"Now if and when it appears from the evidence that a conspiracy did exist, if it does, and that a particular individual was a member of it, then and thereafter any acts knowingly done, any statements made by any person likewise found to be a member of this partnership in crime or this conspiracy may be considered by you as evidence in the case not only as to the man who did it or said it, but as to every other partner, every other member of the conspiracy whom you find at that time to be a member of the conspiracy based on his own acts or his own statements.

"This is true even though the acts and the statements occurred outside of his presence, without his knowledge, provided only such acts and statements must have been in furtherance of an object or of the purposes of the conspiracy. A partner may be bound only with respect to acts of another partner which are within the scope of the partnership business under commercial law. The same thing is applicable in a conspiracy. A partner may be bound only with respect to acts and statements of a co-conspirator in furtherance of the purposes or objectives of the conspiracy." (A. 81-82)

The jury returned the following verdicts: The defendant John Capko was found not guilty: the petitioner Albert Roviaro was found guilty on all counts; and the jury disagreed as to the defendant Walter Anderson and a mistrial was declared as to him (A. 98-99).

The defendant, Walter Anderson, was subsequently dismissed on the government's motion so that the petitioner Roviaro was the only person found guilty in the charged conspiracy (see docket of 65 CR 543, page 6).

Roviaro was subsequently sentenced to 10 years on Count One and 5 years on Counts 2 and 3 to run concurrently. The sentence was later changed to 5 years on Count One and 5 years on Counts 2 and 3, the sentences on Count 2 and 3 to run concurrently with each other but consecutively to the sentence on Count One. (See docket of 65 CR 543, pages 6 and 7.)

The conviction was appealed to the Court of Appeals and affirmed in *United States* v. *Roviaro,* 379 F.2d 911 and Roviaro commenced serving his sentence in November, 1967.

The petitioner then filed his motion under Section 2255 of Title 28, United States Code, on June 13, 1968, alleging violation of the petitioner's rights under the Fourth Amendment and moving for vacation of his sentence and judgment of conviction (R. 2).

On August 8, 1968, the petitioner amended his motion adding allegations of denial of his rights to confrontation, cross-examination, and a fair trial under the Sixth Amendment (R. 7).

On September 11, 1968, the United States filed its motion to dismiss (R. 13) and filed its memorandum in support thereof on September 25, 1968 (R. 17).

The petitioner filed his memorandum in opposition to the motion to dismiss on October 4, 1968 (R. 19), and the United States then filed a reply memorandum on October 10, 1968 (R. 20). The petitioner filed memorandums of additional authority on October 16, 1968 (R. 21, 22).

On October 21, 1968, the parties then appeared before Judge Will for ruling on the motion at which Judge Will indicated he was going to deny the petition but further stated:

> "I am going to determine this on the basis of White. Whatever they do in White, I am going to take as controlling. If they adhere to the earlier decision of White, I am going to grant your 2255. If they reverse themselves, I am going to deny it . . ." (R. 35, pages 8-9)

The Court further indicated it did not feel the *Bruton* decision was controlling and then continued the matter from time to time for ruling to await the *en banc* decision of the Court of Appeals in *United States* v. *White* which was eventually rendered on January 7, 1969, and is now reported at 405 F.2d 838, cert. granted 394 U.S. 957, 22 L.Ed.2d 559.

On January 14, 1969, the parties appeared before Judge Will for ruling, and at that time, the Court indicated it did not like the opinion in *White* and that therefore the Court was going to distinguish the *White* opinion and deny the petition (R. 36, page 11).

Subsequently, on February 4, 1969, the District Court not having yet entered judgment, the petitioner moved to reconsider and cited as additional authority the opinion of the Court of Appeals in *United States* v. *Waller,* No. 16426, January 31, 1969 (R. 29). The motion was denied (R. 30). On February 17, 1969, the Court filed its opinion (R. 31).

In the District Court's opinion, the Court attempts to distinguish the instant case from *White* and *Bruton.* In particular, the District Court attempts to distinguish *Bruton* on the basis of "confession" versus unculpatory extrajudicial statements and acts, and relies on its protective instruction to sustain its denial of a severance to the petitioner (R. 31, pages 14-18).

REASONS FOR GRANTING THE WRIT

1. THE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT AND 47 U.S.C. 605 WERE VIOLATED.

The facts in this petitioner's criminal case show that evidence of conversations between the petitioner and a government coerced informer overheard via radio transmitters was used to obtain the petitioner's conviction in violation of the petitioner's rights under the Fourth Amendment to the Constitution of the United States. This evidence was in the form of testimony of government agents as to their memory of the contents of the conversation. Most of the testimony was repetitive of testimony of the informer Drake. However, in one notable exception, agent Theisen testified to a conversation he allegedly overheard via the radio transmitter while he was riding in his car following the informer Drake and the petitioner Roviaro as they were driving to O'Hare Airport (A. 49).

That testimony was to the effect that the petitioner Roviaro told Drake about his past associations with Drake's father Orville. This testimony went far to establish the government's contention on trial that the petitioner had dealt and associated with the deceased alleged conspirator Orville Drake as a part of the conspiracy alleged in the indictment.

It must be remembered that all of the conversations testified to were unrecorded, and were simply testimony by the overhearer to his recollection of what he heard via the eavesdropping equipment.

Further, it must be considered that the informer Drake was coerced into cooperating with the agents (A. 34) and thus it cannot be said that he consented to any of the overhearings.

Certainly, the government has not made a showing that the informer consented or would have consented to the electronic eavesdropping and the eavesdropping of telephone comunications (A. 30-31) if he had not been under the threat of prosecution and mandatory imprisonment, when convicted. (Such a showing would have to be made beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18, 17 L.Ed. 2d 705.)

The failure to demand recovery of some $1,300.00, money which was paid to the informer for narcotics by federal agents (A. 56), and the subsequent dismissal of the complaint charging established sales of narcotics against the informer (A. 44), in fact, affirmatively demonstrate the coercion under which he acted.

The facts also show that evidence of telephone conversations were received. There was testimony of Richard Jones (A. 45), an Indianapolis police detective, and Edward Cass (A. 42), a narcotics agent, to conversations they overheard the informer Drake make to the petitioner Roviaro. There was also evidence in the form of telephone records introduced through an agent of Illinois Bell Telephone Company exposing the existence of long distance calls. All of this evidence was allowed in over objections and in violaiton of the petitioner's rights under the Fourth Amendment to the Constitution of the United States and Section 605 of Title 47, United States Code, and contrary to *United States* v. *Dote,* 371 F.2d 176.

It is argued that by virtue of the admission of the evidence outlined heretofore, the petitioner's conviction is vitiated under the Seventh Circuit Court of Appeal's hold-

ings in *United States* v. *White,* 405 F.2d 838, cert. granted 394 U.S. 957, 22 L.Ed. 2d 559, and in *United States* v. *Dote,* 371 F.2d 176.

In the *White* case, the Court of Appeals, *en banc,* specifically held that regardless of the consent of the informer, the placing of the transmitter on the informer's person to overhear the defendant's conversation was a violation of the defendant's Fourth Amendment rights.

> ". . . we are of the opinion that the surreptitious monitoring of the defendant's conversations was a naked violation of his rights and that the resultant seizure of his statements was not made in conformity with the provisions of that amendment."
>
> (405 F.2d 838, at 848)

This case was of course presented to the District Judge who, contrary to his statement that he was going to do "whatever they do in White" (R. 35, page 9), chose to ignore and distinguish the *en banc* decision of the Court of Appeals (R. 36, page 11). The panel of the Court of Appeals deciding this case likewise ignored the *en banc* decision of the Court.

This Court has granted certiorari in the *White* case and has heard argument. It has since ordered that the case be re-argued (38 L.W. 3267). If this Court should affirm the Seventh Circuit *en banc* decision in *White,* the decision in the case at bar must be reversed.

Further, this Court's attention is directed to the fact that the commission of eavesdropping and its disclosure in this case is a felony under Illinois law. Chapter 38, Section 14-1 et seq. Illinois Revised Statutes. (See *People* v. *Kurth,* 34 Ill. 2d 387, 216 N.E. 2d 154; *Edna Mae Development Company* v. *Chicago Title and Trust Company,* 79 Ill. App. 2d 251, 223 N.E. 2d 285; and *People* v. *Wolfson,* 79 Ill. App. 2d 309, 224 N.E. 2d 581.)

In the exercise of the Court's supervisory power over the administration of criminal justice and to maintain the "appearance of justice", it is suggested that this Court cannot condone the commission of felonious acts by government agents and employees.

Lastly, it is argued that the petitioner's conviction was vitiated by the introduction of vitally corroborative telephone conversations and records of the Illinois Bell Telephone Company as to the existence of long distance calls into evidence over objection and in violation of Section 605 of Title 47 of the United States Code.

The Seventh Circuit has specifically held that such evidence is inadmissible (*United States* v. *Dote,* 371 F.2d 176).

For the foregoing reasons, it is argued that the petitioner's rights under the Fourth Amendment and the Federal Statutes were violated and the judgment of the Court of Appeals affirming the judgment of the District Court granting the government's motion to dismiss the petitioner's 2255 motion should be reversed and the petitioner's sentence and judgment of conviction be vacated.

2. THE PETITIONER'S RIGHTS TO CONFRONTATION, CROSS-EXAMINATION, AND A FAIR TRIAL AS GUARANTEED UNDER THE SIXTH AMENDMENT WERE VIOLATED.

The petitioner argues that his rights to cross-examination and confrontation of witnesses as secured by the Sixth Amendment to the Constitution and his right to a fair trial by jury as secured by the Sixth Amendment to the Constitution were violated in obtaining his conviction and sentence, and that therefore his conviction and sentence should be set aside.

The petitioner was charged in the indictment with conspiring with eleven other persons, three of whom were also named as defendants: Walter Anderson, Richard Sandsbury, and John Capko (A. 2).

The defendant, Richard Sandsbury, was dismissed on the government's motion after the testimony of two witnesses: Richard Collins (A. 21-24) and Robert Anderson (A. 24-27), neither of whom testified to knowing the petitioner, nor did they give any evidence directly concerning the petitioner. Both did testify to acts and statements of Richard Sandsbury and specifically as to dealings with narcotics. They described details of the purchase and use of alleged narcotics. They testified to the effect injections had upon them (A. 22, 24) and of the pains and fear of withdrawal (A. 23). All of this testimony had been received over a standing objection (R. 19, page 11) and subject to the Court's "protective instruction" to the effect:

> ". . . under our system of law you may take into consideration with respect to any one defendant only things which he said or did.
>
> "Therefore, any testimony about a conversation with Mr. Sandsbury is applicable only to Mr. Sandsbury, and is not applicable to Mr. Anderson, to Mr. Roviaro or to Mr. Capko.
>
> "There is one exception to that general principle, and that is that if you find, if you ever do, if you find that there was a conspiracy . . ." (Tr. 123) (R. 19, page 11)

Further, the Court denied the petitioner's motion to strike the testimony (Tr. 293, R. 19, page 11).

It should be noted that the petitioner had moved for severance twice prior to trial (A. 7, 21) and renewed

his motion for severance at the close of the government's case (A. 90-91) and at the close of all evidence (A. 91). All of these motions were denied.

The government, in dismissing Sandsbury, was in effect admitting that under the law there was insufficient evidence to prove he was guilty of conspiracy (specifically conspiring with the petitioner and therefore the petitioner did not conspire with him).

The jury found the defendant, John Capko, was not guilty (A. 99-100). Therefore, the petitioner could not be guilty of conspiring with John Capko.

The jury disagreement as to the guilt of Walter Anderson and the resultant mistrial (A. 98-99) show that the jury did not unanimously find that Walter Anderson conspired with the petitioner beyond a reasonable doubt, and therefore under the law, it could not have found that the petitioner conspired with Walter Anderson.

If the Court's instruction were followed, therefore, the jury was not to consider any of the testimony or evidence of acts or statements outside of the petitioner's presence or knowledge that were admitted against Sandsbury, Capko, or Walter Anderson.

> "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds. . . . The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . ." *Bruton* v. *United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 481.

It was contended by the government in the District Court that the mere fact that the petitioner's co-defendants were acquitted and the fact that the issue of the

prejudicial effect of the evidence was treated in the petitioner's direct appeal should foreclose the issue now. The Court of Appeals, in its opinion on the petitioner's direct appeal, specifically held that because of the trial court's limiting instructions evidence could not be said to be prejudicial. (*United States* v. *Roviaro,* 379 F.2d 911, 914).

However, it should be noted that the petitioner's direct appeal was taken and the decision was rendered without the benefit of *Bruton,* and while the law was as stated in *Delli Paoli* v. *United States,* 352 U.S. 232, 1 L.Ed. 2d 278, and *United States* v. *Torres,* 354 F.2d 633.

> "We therefore overrule Delli Paoli and reverse." *Bruton* v. *United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 479.

Petitioner further argues that his right to confrontation was violated by allowing evidence of acts and statements of an alleged unindicted co-conspirator who was dead at the time of the trial.

Testimony of many acts of the deceased Fred Drake and of the fact there were conversations with the clear import of what the conversations were, was allowed in evidence (A. 24, 25, 27, 28, 37, 38, 39, 41). Most of this testimony was admissible only against Walter Anderson, since most concerned acts and statements outside the presence and knowledge of the petitioner but within Walter Anderson's knowledge. Further, much of the testimony was of acts prior to 1960, outside of the statute of limitations.

By allowing such testimony and evidence to go to the jury, in view of the disagreement in verdict on Walter Anderson, and the conclusion therefore that the petitioner could not be found guilty of conspiring with Walter An-

derson, it becomes clear that the jury was allowed to consider prejudicial evidence which was not admissible against the petitioner, to convict the petitioner.

The violation of the petitioner's right to confrontation becomes evident when it is remembered that he was not present when most of the acts of the deceased unindicted but alleged co-conspirator Fred Drake took place, and that the petitioner was unable to call the deceased man to the stand at his trial, as well as being unable to call his live co-defendant Walter Anderson, who was the only other person alleged to have been present other than the testifying witness, because of the joint trial.

The Court instructed the jury as follows:

> "Now if and when it appears from the evidence that a conspiracy did exist, if it does, and that a particular individual was a member of it, then and thereafter *any acts knowingly done, any statements made by any person likewise found to be a member of this partnership in crime or this conspiracy may be considered by you as evidence in the cases not only as to the man who did it or said it, but as to every other partner, every other member of the conspiracy whom you find at that time to be a member of the conspiracy based on his own acts or his own statements.*" (Emphasis added.) (A. 81)

It is clear from the disagreement on the verdict as to Walter Anderson that at least one juror and possibly more believed that Walter Anderson had been proved to be a member of "the conspiracy" beyond a reasonable doubt. It is further clear that from the verdict of guilty as to the petitioner that all the jurors believed that the petitioner had been proved to be a member of "the conspiracy" beyond a reasonable doubt.

The reasonable conclusion is that at least those jurors who believed Walter Anderson was a member of "the conspiracy" then followed the Court's instruction and considered acts and statements of Walter Anderson as well as other evidence admissible solely against Walter Anderson not only as to Walter Anderson but as to the petitioner.

Certainly, it cannot be found that such is not the fact beyond a reasonable doubt as would be required (*Chapman* v. *California,* 386 U.S. 18, 17 L.Ed. 2d 705).

The petitioner's inability to call Walter Anderson to the stand makes the violation of the petitioner's rights to confrontation, cross-examination and a fair trial by jury, as secured by the Sixth Amendment, clear.

The Court's attention is directed to the recent case of *United States* v. *Bujese,* 2 Cir., 378 F.2d 719, reversed 382 U.S. 297, 20 L.Ed. 2d 1113, 88 S.Ct. 2064; remanded for new trial 405 F.2d 888.

In that case, the co-defendant whose statement implicated the defendant, took the stand and testified, and in that testimony, attempted to exonerate the defendant Bujese. There was no objection in the trial court to the prejudicial statement, yet this Court reversed the conviction and remanded the cause to the Second Circuit in light of *Bruton,* and that Court then reversed and remanded the cause for a new trial. It is suggested that in the case at bar, the error was preserved by objections and motions for mistrial, and that the violations of the petitioner's rights under the Sixth Amendment to confrontation, cross-examination, and a fair trial were far more pervasive than in the *Bujese* case.

The Court's attention is also called to the following cases:

Johnson v. *Yeager,* 3 Cir., 399 F.2d 508, where the Court held that admission of co-defendants' confessions under limiting instructions was constitutionally erroneous under *Bruton.*

United States v. *Greene,* 6 Cir., 400 F.2d 847, where the Court held at 848:

> "Although the general rule is that the subsequent striking of erroneously admitted evidence accompanied by a clear and positive instruction to the jury to disregard it cures the error . . . If the evidence is of such an exceptionally prejudicial character that its withdrawal from the consideration of the jury cannot remove the harmful effect caused by its admission, a new trial will be granted."

It might be noted that in the case at bar, the trial judge denied motions to strike the testimony.

Kinser v. *Cooper,* 6 Cir., 413 F.2d 730, where the Court held that where a codefendant tried jointly with the defendant was charged with aiding and abetting the defendant in perpetration of a rape, that comment upon the failure of the codefendant to testify necessarily implicated the defendant, was prejudicial, and violated his right to a fair trial.

United States v. *Heft,* 7 Cir., 413 F.2d 1027, where a different panel of the Seventh Circuit held that where evidence has been seen by the jury, the defendant cannot later be protected by instructions to the jury and a new trial should be granted.

It is thus suggested that there now exists a conflict amongst the Circuits, and even a conflict amongst panels of the Seventh Circuit as to the effect of this Court's holding in *Bruton.*

It is further suggested that as this Court held in *Bollenbach* v. *United States,* 326 U.S. 607, 613, 90 L.Ed. 350, 355:

> "conviction ought not to rest on an equivocal direction to the jury . . ."

The protective instructions in the case at bar, when contrasted to the trial court's denial of motions to strike, are at best equivocal.

The Petitioner submits that his sentence and conviction were obtained in violation of his rights to confrontation, cross-examination and a fair trial by jury, and therefore should be set aside.

CONCLUSION

For the foregoing reasons, the Petitioner prays that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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29 South LaSalle Street
Chicago, Illinois 60603
312-332-7374
Attorney for Petitioner.

March, 1970

It is further suggested that as this Court held in *Bollenbach v. United States*, 326 U.S. 607, 613, 90 L.Ed. 350, 355:

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CONCLUSION

For the foregoing reasons, the Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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29 South LaSalle Street
Chicago, Illinois 60603
312-332-7374
Attorney for Petitioner.

March, 1970

APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 SEPTEMBER SESSION, 1969

No. 17494

ALBERT ROVIARO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JANUARY 5, 1970

Before CASTLE, *Chief Circuit Judge,* SWYGERT, CIRCUIT *Judge,* and GORDON, *District Judge.*

GORDON, *District Judge.*[1] The appellant, Albert Roviaro, was convicted of violating 21 U.S.C. §174, which deals with conspiracy under the narcotics laws. An appeal from the conviction has previously been decided adversely to

[1] The writer of this opinion is sitting by designation from the district court for the Eastern District of Wisconsin.

the defendant. *United States* v. *Roviaro,* 379 F.2d 911 (7th Cir. 1967). Mr. Roviaro then sought relief under 28 U.S.C. §2255, and the present appeal is taken from the trial court's denial of his §2255 motion. He alleges that his constitutional rights under the fourth and sixth amendments were violated.

Conversations between the defendant and a government informer, who wore a Kel-set transmitter taped to his body, were monitored by a federal agent. Over the defendant's objections, these conversations were admitted into evidence. The defendant's reliance on *United States* v. *White,* 405 F.2d 838 (7th Cir. 1969), cert. granted 394 U. S. 957 (1969), is misplaced. In *United States* v. *Teller,* 412 F.2d 374 (7th Cir. 1969), we recognized that *White* could not be retroactive beyond December 18, 1967 for the reason that *White* relied upon *Katz* v. *United States,* 389 U.S. 347 (1967), and the date of the *Katz* opinion, December 18, 1967, was set by the supreme court as the retroactive limit of the rule in *Katz* in the court's subsequent decision in *Desist* v. *United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed. 2d 248 (1969). Since the Kel-set transmitter in the instant case was not used after May 4, 1963, this court must apply the "trespass" theory of *On Lee* v. *United States,* 343 U.S. 747 (1952). We find that no trespass was committed under the facts of the case at bar.

The defendant argues that the introduction into evidence of a telephone conversation between the defendant and the same government informer was error. A federal agent listened to the conversation over the shoulder of the informer, with the latter's permission, and repeated the

conversation in court. This practice was specifically approved in *United States* v. *Martin,* 372 F.2d 63 (7th Cir. 1967).

Challenge to the conviction under the sixth amendment is based on *Bruton* v. *United States,* 391 U.S. 123 (1968), where the court held the admission of an out of court statement by a co-defendant, inculpating Bruton, was reversible error. The indictment in the case at bar charged Mr. Roviaro with conspiring with eleven other persons. Three of those eleven were named as co-defendants. Of those three, one was acquitted, another had the indictment against him dismissed, and the third man's case ended with a hung jury; only Mr. Roviaro was convicted. The appellant argues that evidence involving his co-defendants must have been improperly used against him, but we do not find this claim impressive. The jury may have believed that Mr. Roviaro conspired with one or more of the eight alleged conspirators who were not indicted.

There are no allegations before us as to what specific evidence was prejudicial to the defendant other than some statements by two addicts describing drug addiction to the jury. In *Bruton* and the cases which have applied its doctrine, there were extra-judicial statements which clearly inculpated another defendant. See *Serio* v. *United States,* 401 F.2d 989 (D.C. Cir. 1968); *Johnson* v. *Yeager,* 399 F.2d 508 (3rd Cir. 1968); *United States* v. *Lyon,* 397 F.2d 505 (7th Cir. 1968). No such showing has been made here by Mr. Roviaro.

In his jury instructions, the trial judge carefully explained which statements could be applied to which defendants. There is no reason to believe that the jury did not

understand and heed his instructions since they acquitted one defendant, convicted another, and split their vote as to the other; this is a striking indication that the jury did not apply all the evidence to all the defendants. We conclude that there was no denial of sixth amendment rights.

The district court's denial of the §2255 motion is therefore affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALBERT ROVIARO, #84175,,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

68 C 1092

OPINION
(Filed February 17, 1969)

Petitioner is presently incarcerated in the Federal Correctional Institution at Leavenworth, Kansas. He was sentenced by this Court on March 22, 1966, after a jury found him guilty on each count of a three count indictment. The first count charged petitioner with conspiring to import and bring narcotic drugs into the United States and to receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of such narcotic drugs violation of Section 174 of Title 21 of the United States Code. The second and third counts charged petitioner with unlawful and knowing use of a communications facility, i.e., a telephone, in committing and causing and facilitating the commission of, and in attempting to commit, a criminal offense in violation of Section 1403 of Title 18 of the

United States Code. A ten year sentence was imposed on the first count and five year sentences were imposed on the other counts, these sentences to run concurrently.

Petitioner's conviction was affirmed on appeal. *United States* v. *Roviaro,* 379 F.2d 911 (7th Cir. 1967). On November 1, 1967, on motion of petitioner, the sentences were modified by this Court: the sentence on the first count was reduced to five years and the five year sentences on the second and third counts were conditioned to run consecutive to the sentence on the first count but concurrent with each other.

Petitioner presently seeks to have these sentences vacated and set aside under the provisions of Section 2255 of Title 28, United States Code. He contends that his conviction is vitiated by the admission, over his specific objection, of certain evidence obtained in violation of his rights under the Fourth Amendment to the Constitution of the United States. This evidence consisted of the testimony of certain government agents relating to incriminating statements made by petitioner in various conversations with a government informer, which the agents overheard by means of electronic eavesdropping . Petitioner further alleges that his conviction was obtained in violation of his rights of cross-examination and confrontation of witnesses as secured by the Sixth Amendment. He also argues that the Court's denial of his motion for severance allowed the government to put substantial prejudicial testimony into evidence which would have been inadmissible if he had been granted a separate trial. The respondent has moved to dismiss.

At the trial, Fred Drake, a government informer, testified to the substance of a number of transactions and conversations with the petitioner involving the sale of quanti-

ties of narcotic drugs. Drake also testified to the substance of a number of telephone conversations which he had with petitioner concerning the sale of narcotics. As part of his testimony, Drake specified certain of these telephone conversations which he permitted Edward Cass, a federal narcotic agent, physically to overhear. Drake further stated that on two occasions, February 15, 1963 and May 4, 1963, he wore a small radio transmitter, attached to his person by government agents, during meetings with petitioner.

Following Drake's testimony, the government called three federal narcotics agents who testified to the conversations which are presently in question. Edward Cass testified to the telephone conversations he physically overheard between Drake and petitioner. Agent Cass also testified to a conversation between Drake and petitioner in a restaurant on February 15, 1963, which he had overheard on a radio receiver. Agent Bernard Theisen testified to a conversation between Drake and the petitioner which occurred in Drake's car also on February 15, and a conversation between Drake and petitioner later that day at a restaurant. Agent Theisen overheard these conversations by means of a radio receiver. Agent Robert A. Waltz testified to conversations at a subsequent meeting between Drake and petitioner in a restaurant on May 4, 1963. The informer again wore a secret radio transmitter, and agent Waltz overheard the conversations through a radio receiver. In none of the above instances did the agents obtain a search warrant or court order authorizing the eavesdropping.

In support of his contention that the admission of this testimony was in violation of the Fourth Amendment, petitioner relies on *Katz* v. *United States*, 389 U.S. 347 (1967) and the recent decisions of *United States* v. *White*, Nos. 16021-16022 (7th Cir., filed Jan. 7, 1969), and *United States* v. *Waller*, No. 16426 (7th Cir., filed Jan. 31, 1969).

The *Katz* case is the most recent Supreme Court decision dealing with the admissibility of electronically obtained eavesdrop evidence. In *Katz,* agents of the Federal Bureau of Investigation, having probable cause and acting in a carefully restricted manner but without prior judicial approval, placed an electronic listening and recording device outside a public telephone booth and intercepted telephone conversations which the defendant made from the booth to others without the knowledge or consent of the defendant or any of the parties to the conversations. Reversing the conviction, the Supreme Court held that the interception of the conversations by such covert electronic surveillance constituted an unlawful seizure in violation of the defendant's fourth amendment rights, and that the admission of the conversations was therefore improper. The Supreme Court's decision was based on the lack of a search warrant or prior judicial authorization for the interception of the conversations. Under the circumstances, antecedent jusification before a magistrate was deemed essential to insure proper protection of the defendant's fourth amendment guarantees.

In the *White* case, the Court of Appeals for the Seventh Circuit held that the principles announced in the *Katz* decision were equally applicable to a situation where private conversations between individuals were monitored by government agents with the consent of one of the participants. *White* involved the following facts. Agents of the Federal Bureau of Narcotics, acting without a search warrant or prior judicial approval, placed a miniature radio transmitter on the government informer prior to his conversations with the defendant. The agents were able to overhear certain conversations between the informer and the defendant without defendant's knowledge through radio receivers.

The informer did not testify at the trial, but testimony by the narcotics agents recapitulating these conversations was admitted. On appeal, this testimony was held to be inadmissible and defendant's conviction was reversed.

The decision of the Court of Appeals was based on two general principles, stated in the *Katz* opinion. The first of these is "that the fourth amendment is designed to preserve privacy against the 'uninvited ear' of government and must be applied to 'protect people, not places.'" *United States* v. *White,* Nos. 16021-16022, at 7 (7th Cir., filed Jan. 7, 1969). The second is "that conversations are within the scope of the fourth amendment's protection. . . . *Id.* at 7. In light of these principles, the Court found that the factual differences between the *Katz* and *White* situations were not legally significant, stating,

> It is our opinion . . . that the surreptitious placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in *Katz.* Each act was part of a "bugging" technique by which a conversation was transmitted to an "uninvited ear"—government agents. The crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker. *Id.* at 7-8.

The Court of Appeals then concluded that the failure of the agents to secure prior judicial approval for the interception of the defendant's conversations rendered the content of these conversations "per se inadmissible evidence." *Id.* at 8-9.

Petitioner, relying on *White,* submits that since the conversations in question in the instant case were monitored by the agents without prior judicial authorization, the

testimony of the agents relating to these conversations was, likewise, inadmissible. However, in *White* the Court of Appeals noted at least two exceptions to the "per se rule" which are relevant to the propriety of the admission of the testimony in question.

The first of these exceptions was outlined in *Rathbun* v. *United States,* 355 U.S. 107 (1957). In *Rathbun,* the Court determined that each party to a telephone conversation has constructive knowledge and bears the risk that the other party may have an extension line and may allow another to overhear the conversation. *See, also, Williams* v. *United States,* 311 F.2d 721, 725 (7th Cir.), *cert. denied,* 375 U.S. 812 (1963). In such circumstances, the interception of the speaker's conversation by an uninvited third party, with or without the complicity of the intended listener, could have been anticipated by the speaker and he cannot complain of a violation of his right to privacy. Consequently, his statements are admissible as evidence against him. See *United States* v. *White,* Nos. 16021-16022, at 10-11, 13 (7th Cir., filed Jan. 7, 1969).

This exception is applicable to a substantial portion of the testimony of agent Cass at petitioner's trial. All but one of the telephone conversations overheard by agent Cass were received by the informer either at his home or the agent's office. The record discloses no extraordinary precautions by petitioner to guard the privacy of these conversations. The circumstances of these conversations was such that petitioner assumed the risk that his statements might be overheard by a third party on an extension. Accordingly, the interception of these conversations by Cass cannot be deemed an unreasonable seizure within the meaning of the Fourth Amendment and the testimony of agent Cass as to their content was properly admitted.

The only remaining conversation which was overheard by agent Cass, was received by the informer at a public telephone booth. Prior to this conversation, particular arrangements regarding the time and place of this telephone call were made between petitioner and the informer. These arrangements were designed to guard the privacy of this conversation and petitioner could not have justifiably anticipated that it would be overheard by a third party.

In this regard, a second "exception," which was noted in the *White* opinion, is pertinent. This exception is illustrated by *Lopez* v. *United States,* 373 U.S. 427 (1963). In *Lopez* a concealed device on the person of an undercover agent recorded a conversation between him and the defendant. Admission in evidence of the recording itself to corroborate the undercover agent's testimony was upheld by the Supreme Court of the United States. Thus, the *Lopez* decision indicates that where an informer testifies as to conversations with a defendant, a recording of such conversations is admissible for the limited purpose of corroboration. See *United States* v. *Waller,* No. 16426 (7th Cir., filed Jan. 31, 1969); *United States* v. *White,* Nos. 16021-16022, at 13 (7th Cir., filed Jan. 7, 1969).

Under this rationale, the telephone conversation in question was clearly admissible. Indeed, under *Lopez,* all or substantially all of the eavesdrop evidence presently in question would appear to be admissible. Prior to the testimony of any of the eavesdropping agents, Drake appeared and testified at length to the various conversations which were overheard by the agents. The subsequent testimony of the agents did not substantially expand or modify the testimony of Drake but tended only to affirm or corroborate the content of the conversations as related by

him. The fact that *oral* testimony, rather than a recording, was offered to corroborate the informer's testimony would not appear to distinguish *Lopez.* Petitioner was free to challenge the credibility of the agents, as well as the informer. Indeed, such oral testimony is more susceptible to impeachment than a recording.

Petitioner points out, however, that agent Theisen testified to a conversation that was not testified to by Drake. He submits that the admission of this testimony requires the vacation of his conviction, citing *United States* v. *Waller,* No. 16426 (7th Cir., filed Jan. 31, 1969).

The *Waller* decision has several factual features which distinguish it from the present case. In *Waller,* a federal narcotics agent testified to a conversation between the defendant and a government informer, which he overheard by means of an electronic eavesdropping device. The informer, although present during the trial, did not testify. In reversing the defendant's conviction, the Court of Appeals for the Seventh Circuit held that the admission of the agent's testimony was improper because it allowed the government to substitute evidence obtained by electronic eavesdropping for the testimony of the informer.

The important distinction between the instant case and *Waller* is that in this case, with one exception, the informer actually testified to the conversations in question. The sole exception was a conversation which occurred while petitioner and Drake were driving to O'Hare Airport in the latter's car. At the trial, Drake testified to having made this trip and explained the circumstances which occasioned the trip. The testimony of agent Theisen, therefore, was within the general scope of the testimony of the informer. Certainly, the instant case does not present a situation in which the government sought to con-

ceal substantial factual and legal issues through the introduction of eavesdrop evidence. *See Lopez* v. *United States,* 373 U.S. 427, 441-46 (1963) (concurring opinion).

Even assuming that the admission of this testimony by agent Theisen was improper, the error cannot be said to require the vacation of the conviction. Agent Theisen testified that he heard petitioner tell Drake "about his associations with Drake's father in the old days." This was the entire substance of the testimony concerning the conversation between petitioner and Drake. It is obvious that the content of this conversation was insubstantial and that it was not prejudicial to the defendant. The admission of his evidence, therefore, can at most be regarded as harmless error.

One further point needs to be made in regard to all the challenged eavesdrop evidence. The exclusion of this evidence ultimately depends on whether or not the principles announced in *Katz* v. *United States,* 389 U.S. 347 (1967), upon which the *White* decision was based, are to be applied retroactively. Petitioner's conviction was affirmed by the Court of Appeals on June 28, 1967. A rehearing was denied on August 24, 1967. The *Katz* case was not decided until almost three months later, on December 18, 1967. Prior to *Katz,* evidence obtained by means of electronic eavesdropping without a search warrant, had been held admissible in *On Lee* v. *United States,* 343 U.S. 747 (1952). Thus, if the *Katz* decision is not retroactive, the disposition of the instant case is controlled by *On Lee. See United States* v. *White,* Nos. 16021-16022, at 13 (7th Cir., filed Jan. 9, 1969).

The Supreme Court has indicated in recent cases that the retroactivity of any particular rule depends primarily on the purpose of the constitutional guarantee involved.

If there is an abridgement of a right which affects " 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent,' " the claim can be asserted retroactively. *See Johnson* v. *New Jersey,* 384 U.S. 719, 727-28 (1966). On the other hand, if the constitutional right relates to values and objectives other than that of a fair trial the violation of the right cannot be asserted retroactively. *See Tehan* v. *Shott,* 382 U.S. 406 (1966); *Linkletter* v. *Walker,* 381 U.S. 618 (1965).

Katz would appear to fall within the latter category. It announces an exclusionary rule which is similar to that announced in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The *Mapp* rule, which excluded evidence obtained in an unreasonable search or seizure, was not applied retroactively in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), because exclusion of such evidence was calculated "to deter the lawless action of the police and to effectively enforce the Fourth Amendment." *Id.* at 637. Further, retroactive application of the rule was deemed unnecessary because illegally seized evidence in itself did not tend to affect the fairness of the trial. *See id.* at 637-38.

Substantially the same reasoning is applicable to the rule in *Katz.* It is clear that the exclusion of the recording in *Katz* was intended to encourage police to obtain prior judicial approval for such electronic surveillance. *See* 389 U.S. at 354-59. As in *Mapp,* the purpose of exclusion of the evidence is to prevent police violation of the privacy of individuals and to vindicate the guarantee of the Fourth Amendment. Moreover, the integrity of the fact-finding process is not affected by the manner in which the conversations of the defendant are intercepted. The credence which may properly be given eavesdrop evidence is the same as that which may be given tangible evidence in a

traditional search and seizure case. In addition, *On Lee* has been relied upon by law enforcement officers and been the basis of numerous decisions in the past years. Retroactive application of *Katz* would require reconsideration of literally thousands of cases. The effect this would have on the administration of justice is obvious. In light of these considerations, this Court cannot conclude that *Katz* requires retroactive application.

Petitioner also contends that his right to cross-examination and confrontation of witnesses guaranteed to him by the Sixth Amendment has been violated by this Court's denial of his motion for severance. He argues that through denial of this motion, he was convicted by prejudicial evidence improperly admitted. In making this contention, petitioner relies primarily on the recent decision of the Supreme Court of the United States in *Bruton* v. *United States,* 391 U.S. 123 (1968).

In *Roberts* v. *Russell,* 392 U.S. 293 (1968) the Supreme Court held that *Bruton* is to be applied retroactively and summarized its holding in *Bruton* by stating,

> In *Bruton* v. *United States,* 391 U.S. 123, decided May 20, 1968, we overruled *Delli Paoli* v. *United States,* 352 U.S. 232, and held that, despite instructions to the jury to disregard the implicating statements in determining the co-defendant's guilt or innocence, admissions at a joint trial of a defendant's extrajudicial confession implicating a co-defendant violated the co-defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. This case presents the question whether *Bruton* is to be applied retroactively. We hold that it is. *Id.* at 293.

The government insists that *Bruton* stands only for the proposition that a defendant's right to confrontation is violated where an extrajudicial confession of his co-defendant is introduced at their joint trial. In reply, petitioner calls attention to cases subsequent to *Bruton* which may read the confrontation rationale of *Bruton* to apply in cases where the particular item of evidence in question is not an inculpatory extrajudicial confession.

Nevertheless, although the fundamental concern of *Bruton* is the right of confrontation, the focus in *Bruton* on the inculpatory extrajudicial confession demonstrates that there must at least be a showing of substantial prejudice before severance will be constitutionally required. In the instant case, petitioner has not shown that any prejudice resulted from denial of the motion for severance. He mentions the admission of some testimony describing details of the purchase and use of narcotics, but this testimony does not by any means involve the possible prejudice upon which a Sixth Amendment claim of right must be based. Furthermore, although it should not be assumed that prejudicial effects will be overcome by protective instructions to the jury, *Bruton* v. *United States*, 391 U.S 123, 129 (1968), it should be noted that the following protective instruction *was* given in this case:

> Let me now explain to the ladies and gentlemen of the jury. Any time you have multiple defendants, whether in a conspiracy trial or even though they are not charged in a conspiracy, but just charged with different or separate and similar acts, the jury must understand that under our system of law you may take into consideration with respect to any one defendant only things which he said or did.
>
> Therefore any testimony about a conversation with Mr. Sandsbury is applicable only to Mr. Sandsbury, and is not applicable to Mr. Anderson, to Mr. Roviaro or to Mr. Capko.

> There is one exception to that general principle, and that is that if you find, if you ever do, if you find that there was a conspiracy and you conclude from the evidence as it applies to a particular individual that he was a member of that conspiracy, then you may take into consideration with respect to that individual the acts of other individuals who you find are members of that conspiracy. Record at 123.

Petitioner also contends that prejudice is apparent in this case because there was disagreement among the jurors as to the guilt of one defendant, Walter Anderson, and a mistrial was declared as to Anderson, while petitioner was, on the other hand, found guilty by the jury. He maintains that the action by the jury shows that some or one of the jurors must have considered Walter Anderson to be guilty and must have considered evidence concerning Walter Anderson incriminating as to petitioner.

But as the Court of Appeals pointed out on direct appeal of this case,

> The jury's acquittal verdict evinced its conclusion that defendant had not conspired with John Capko. Despite its disagreement with respect to Walter Anderson's guilt, the jury could have concluded that defendant conspired with some of the other nine co-conspirators named in Count One of the indictment and possibly with Walter Anderson. Certainly Fred Drake's testimony could cause the jury to conclude that he had conspired with defendant before becoming a government informer. This is enough to support defendant's conviction. *United States* v. *Roviaro,* 379 F.2d 911, 914 (7th Cir., 1967).

Contrary to what petitioner contends, the subsequent decision in *Bruton* does not by any means affect the logic or import of this statement by the Court of Appeals.

Finally, petitioner contends that his right to confrontation was violated by admission into evidence of acts and statements of an alleged unindicted co-conspirator who was dead at the time of petitioner's trial. But the cases establish that it is permissible to introduce evidence based on the activities of a deceased co-conspirator so long as they are in furtherance of the conspiracy, and this is so even where statements of a deceased co-conspirator are introduced into evidence. *See, United States* v. *Marchiso,* 344 F.2d 653, 668 (2nd Cir., 1965).

Furthermore, while the cautionary instruction by the court is again not determinative of the question of prejudice, the giving of the instruction reinforces the propriety of the admission of evidence as to acts of the alleged unindicted co-conspirator and alleged admission of implications about the content of conversations with the alleged unindicted co-conspirator.

Although the cases require and Rule 14 of the Federal Rules of Criminal Procedure authorizes a severance where a defendant may be prejudiced by a joint trial, the benefits to the administration of justice which accrue from use of the joint trial should not be gainsaid on the basis of mere unfounded speculation that joint trial prejudices a defendant. Such speculation is all that has been suggested for the court's consideration in this case, both at trial and in the instant petition.

For the foregoing reasons, respondent's motion to dismiss the petition is granted. An appropriate order will enter.

HUBERT L. WILL
United States District Judge

Dated February 17, 1969

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1277

ALBERT ROVIARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was tried with three others in the United States District Court for the Northern District of Illinois on a charge that they, along with eight other persons, conspired to import and sell heroin in violation of 21 U.S.C. 174. Petitioner was convicted by a jury,[1] and the court of appeals affirmed. *United*

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[1] One co-defendant was acquitted by the jury; the indictment against another co-defendant was dismissed on the government's motion; the prosecution against the third co-defendant ended in a jury disagreement.

Petitioner alone was indicted and convicted on two counts charging use of a telephone to commit the narcotics offenses in violation of 18 U.S.C. 1403.

States v. *Roviaro*, 379 F.2d 911. Petitioner did not seek certiorari.

In the present action under 28 U.S.C. 2255, the district court denied the motion and the court of appeals affirmed (Pet. App. A and B). Petitioner contends that his conviction must be set aside because of error in the admission of evidence of his conversations with an informer (who testified at trial), overheard by means of an electronic device carried on the informer's person with his consent, and of his telephone conversations with the informer, overheard by government agents with the informer's permission without the aid of electronic equipment. Petitioner also argues that his rights under *Bruton* v. *United States*, 391 U.S. 123, and *Roberts* v. *Russell*, 392 U.S. 293, were violated by the admission of statements of a co-defendant as to his own dealings in narcotics, which did not implicate petitioner and which the trial judge charged were not to be considered in connection with petitioner's guilt unless the jury first found that there was a conspiracy.

We rely on the opinion of the court below in urging that the petition for a writ of certiorari should be denied. We believe that there is no need to delay disposition of this case pending the decision in *United States* v. *White*, No. 46, reargument ordered, January 19, 1970. The Seventh Circuit in the instant case distinguished its *White* decision on the ground that the electronic overhearing here took place prior to the decision in *Katz* v. *United States*, 389 U.S. 347, which

this Court has held does not apply retroactively.[2] *Desist* v. *United States*, 394 U.S. 244. Moreover, this case, unlike *White*, but like *Kaufer* v. *United States*, 394 U.S. 458, arises on collateral attack. Compare *Kaufman* v. *United States*, 394 U.S. 217, 228-229. An additional distinction is that in this case, unlike *White*, the informer testified at trial to the content of the overheard conversations.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1970.

[2] The legality of the telephonic overhearings is governed by *Rathbun* v. *United States*, 355 U.S. 107.

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